UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

PAUL J. GRENHAM,)
Plaintiff,)
v.) No.08-CV-11151-LTS
MICHAEL J. ASTRUE,)
Defendant.)

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR JUDGMENT

May 4, 2009

SOROKIN, M.J.

Plaintiff, Paul Grenham, moves pursuant to 42 U.S.C. 405(g) for an order reversing an unfavorable decision by Defendant Commissioner of the Social Security Administration, and remanding his disability claim to the Commissioner for an award of benefits or in the alternative for further proceedings. The Commissioner moves for an order affirming his decision. For the following reasons, Plaintiff's Motion to Reverse or Remand (Docket # 13) is ALLOWED in part and DENIED in part. Defendant's Motion for Order Affirming the Commissioner (Docket # 16) is DENIED.¹

I. Procedural History and Factual Background

On October 14, 2005, Grenham filed an application for Supplemental Security Income

¹This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies.

(SSI) benefits, claiming that he became disabled on October 2, 2004. Transcript, ("Tr.") at 50. Grenham indicated in his application that his disabling impairments were, "herniated cervical and lumbar area disks, radiation to sciatic nerve bundle, depression . . . severe pain in [his] back." Tr. at 78. This application was denied by the Social Security Administration (SSA) on June 24th, 2006. Tr. at 35. Grenham filed a timely Request for Reconsideration on July 25th, 2006. Tr. at 39. The SSA formally denied this Request on September 19, 2006. Tr. at 41. Grenham then filed a Request for a Hearing before an Administrative Law Judge (ALJ) on October 20, 2006. Tr. at 44. This hearing was held in Providence, Rhode Island on October 12, 2007 before the ALJ. Tr. at 467. At this hearing, which lasted twenty-two minutes in full, Grenham was represented by Michelle Pequita, a non-lawyer representative. Tr. at 467-8. On October 26, 2007, the ALJ issued an opinion denying Grenham's claims. Tr. at 12.

The ALJ followed the requisite five-step evaluation process to determine whether Grenham's alleged impairments entitled him to benefits. *See* 20 C.F.R. §§ 404.1520, 416.920; Goodermote v. Secretary of Health and Human Services, 690 F.2d 5, 6-7 (1st Cir.1982); Tr. at 15-25. At step one, the ALJ found that Grenham had not engaged in any substantial gainful activity since at least August 11, 2005. Tr. at 17; *see* 20 C.F.R. § 404.1520(a)(4).

Under the second part of the analysis, the inquiry is whether the claimant has any 'severe impairments', which are those impairments that, "significantly limit the physical or mental capacity to perform basic work-related functions." *See* Goodermote, 690 F.2d at 6; 20 C.F.R. 416.920©. The ALJ found that Grenham had the following severe impairments: "degenerative joint disease of the lumbar spine, obesity, depression, history of learning disabled [sic] and cognitive disorder, and two episodes of cellulitis." <u>Tr.</u> at 17. The third inquiry is whether any of the claimant's

impairments, in isolation or taken together, meet or medically equal one of the Listings in 20 C.F.R. § 404, Subpart P, Appendix 1; if so, the claimant is automatically found to be disabled without reference to steps four and five of the analysis. 20 C.F.R. §§ 404.1520(a)(4). The ALJ found that Grenham's impairments did not meet the clinical requirements of any of the Listings. Tr. at 20.

Since the ALJ did not find Grenham to be disabled under step three, he proceeded to step four. Tr. at 21. At step four, the claimant's residual functional capacity must be compared to the requirements of any past relevant work. 20 C.F.R. § 404.1520(a)(4). The ALJ found that Grenham was unable to perform any of his past relevant work, and so proceeded to step five, where the inquiry is whether the claimant, in light of his residual functional capacity, age, education, and work experience, can do any other work. Id; Tr. at 21-24. Since the ALJ found that, "there are jobs that exist in significant numbers in the national economy that the claimant can perform," he found Grenham not to be disabled as defined by the Social Security Act. Tr. at 24-25.

Grenham objects to the ALJ's conclusion that he is not disabled under step three of the above inquiry. Though Grenham's objections are phrased as four separate points of error all concern one central claim; that the ALJ improperly analyzed the issue of Grenham's IQ scores and therefore failed to properly apply Listing 12.05(c) to Grenham's claim. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05 ("Listing 12.05"); Docket # 14 at 13-16.

As the ALJ noted, Grenham suffers from a variety of maladies. A 2005 MRI confirmed that Grenham has degenerative disc disease of the lumbar spine, as well as a disc protrusion and a disc herniation. <u>Tr.</u> at 100-103. Grenham has also been diagnosed with cellulitis, diabetes, morbid

obesity, obstructive sleep apnea, polysubstance abuse, post-traumatic stress disorder, major depression, a learning disorder, and mild mental retardation. <u>Tr</u>. at 17-20.

The record evidence, culled from a variety of medical reports as well as statements by Grenham himself, paints the following picture of the Claimant's personal history. Grenham was born on April 19th, 1956. His parents both died before his 13th birthday, leaving him in the care of a physically abusive older brother. Tr. at 144. Grenham received "bad" grades in school, and was assigned to special education classes. Tr. at 144, 470. By age 15, Grenham had dropped out of high school. Tr. at 336. By 16, he had begun to abuse alcohol. Id. Shortly after dropping out of the 10th grade, Grenham began working, first unloading trucks at a sneaker factory, then laboring in a paper mill. Tr. at 237. Later, Grenham worked as a grave digger for over a decade, then for an alarm systems company for several years, ending in 1995 when his back pain became more severe. Id. Since this time, Grenham has been employed only for a short period in 2004 when he worked as a janitor at a nursing home. Tr. at 472. In the intervening years, Grenham was married, had three children, and was eventually separated from his wife. Tr. at 237. He also nurtured a serious drug and alcohol addiction, using alcohol, cocaine, amphetamines, opiates, and barbiturates on a regular basis. Tr. at 336. Over the years, Grenham completed nine

² The Commissioner notes that Grenham's initial disability report to the Social Security Administration indicated that he had completed one year of college and had not attended special education classes. Docket # 17 at 3, *citing* Tr. at 84. This report was completed on or after October 3, 2005. Tr. at 85. The Commissioner also notes that Grenham reported to a doctor in 2004 that he had left school in the 10th grade. Id, citing Tr. at 144. It appears that this latter statement was actually made on April 13th, 2005. Tr. at 143-144. In any case, "[t]he resolution of conflicts in the evidence . . . is for the ALJ, not for the doctors or for the reviewing Courts." Lopez Vargas v. Commissioner of Social Security, 518 F.Supp.2d 333, 335 (D.P.R.2007). The ALJ found that Grenham "withdrew from school in the tenth grade to work," never mentioning a year of college. Tr. at 19.

detoxifications and a substance abuse program before becoming, and apparently remaining, sober on October 16th, 2004. <u>Tr</u>. at 234, 474. Since this time, Grenham has resided at a sober house where he assists, in some capacity, with day-to-day tasks such as cooking, shopping, and laundry.

During his analysis under the five-part inquiry, the ALJ noted that Grenham had been diagnosed by Jeffrey Schumer, Psy. D., with, "major depression . . . post traumatic stress disorder, chronic; polysubstance abuse, full sustained remission . . . and *mild mental retardation*," but did not find this latter diagnosis to meet or equal the requirements of Listing 12.05(c). Tr. at 19 (emphasis added). Dr. Schumer made the diagnosis of retardation in November 2006 after administering the WAIS-III test, on which Grenham obtained a full-scale IQ score of 69, placing him in the mild mental retardation range. <u>Tr.</u> at 337. Grenham was fifty years old when he took the IQ test. This test is one of the Wechsler series of intelligence tests, which are specifically mentioned in Listing 12.00(D)(6)(c). The Listing states that, "the narrative report that accompanies the test results should comment on whether the IQ scores are considered valid and consistent with the developmental history and the degree of functional limitation." Listing 12.00(D)(6)(a). Dr Schumer stated unequivocally that, "the . . . results are considered valid measures of his current intellectual . . . functioning.³ Tr. at 337. The ALJ never rejected Dr. Schumer's finding that the IQ test results were valid and properly measured Grenham's intellectual functioning at the time of the test.

Listing 12.05© provides that,

³Dr. Schumer's comment at length also stated that, "Mr. Grenham was cooperative throughout the evaluation. He put forth adequate effort and was well-motivated . . . show[ing] persistence on increasingly challenging test items. He demonstrated an adequate energy level, attention, and on-task behavior." <u>Tr</u>. at 336-337.

Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22. The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function.

<u>Id</u>. Although Grenham had an IQ score of 69, and the ALJ had earlier found that Grenham had several severe impairments, ⁴ <u>Tr.</u> at 17, the ALJ found that he did not meet or equal the requirements of Listing 12.05(c), stating that,

No other treating source diagnosed mental retardation. The diagnosis of mental retardation does not meet the requirements of Listing 12.05(c) because it cannot be established prior to age 22 and because the claimant has a history of alcoholism and a learning disability, both of which could be the cause of the low IQ scores. Additionally Dr. Schumer's diagnosis of mental retardation is in apparent conflict with Dr. Daniels statement that the claimant had only mild limitations on the ability to understand, carry out and remember instructions.

<u>Tr.</u> at 19. Had the ALJ found that Grenham met the requirements of Listing 12.05(c), Grenham would have been found disabled *per se*, and entitled to benefits without regard to steps four and five of the sequential evaluation. 20 C.F.R. § 404.1520(d); <u>Goodermote</u>, 690 F.2d at 6; <u>Mace v. Astrue</u>, 2008 WL 5412293 at 1-2 (D. Me.2008). From this decision, Grenham appeals.

⁴A finding that a claimant has a 'severe impairment' under 20 C.F.R. § 404.1520(c) or 20 C.F.R. 404.920(c), satisfies the requirement under Listing 12.05(c) that the claimant show "a physical or other mental impairment imposing an additional and significant work-related limitation of function." Nieves v. Secretary of Health and Human Services, 775 F.2d 12, 14 n. 7 (1st Cir.1985). Thus, the Court need not address Listing 12.05(c)'s requirement of an impairment. Tr. at 17; Docket #17 at 5.

II. Discussion

A. Standard of Review

The District Court may enter a judgment affirming, modifying, or reversing the Commissioner's decision (with or without remanding for rehearing) but the Court may not disturb the Commissioner's findings where they are supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is such relevant evidence as a reasonable mind accepts as adequate to support a conclusion. Rodriguez v. Secretary of Health and Human Services, 647 F.2d 218, 222 (1st Cir.1981). Determinations of credibility and the resolutions of conflicts in the evidence are for the Commissioner and not for the doctors or for courts. Id. Although an administrative record might support multiple conclusions, a court must uphold the Commissioner's findings wherever a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support them. Irlanda Ortiz v. Secretary of Health & Human Services, 955 F.2d 765, 769 (1st Cir.1991). A denial of benefits, however, will not be upheld where there has been an error of law in the evaluation of the claim. See Manso-Pizarro v.

Secretary Health & Human Services, 76 F.3d 15, 16 (1st. Cir.1996). Similarly, a denial will not be upheld where the finding of the Commissioner is not supported by substantial evidence. Id.

Grenham's appeal assigns error to the ALJ's decision at the third stage of the above inquiry, at which stage a claimant bears the burden of proving that his or her impairment or combination of impairments meets or equals the Listings. 20 C.F.R. §§ 404.1520(d); <u>Dudley v. Secretary of Health & Human Services</u>, 816 F.2d 792, 793 (1st Cir.1987). To meet a listed impairment the claimant's medical findings (i.e., symptoms, signs and laboratory findings) must match those described in the listing for that impairment 20 C.F.R. §§ 404.1525(a), 404.1528,

416.925(d), 416.928. To equal a listing, the claimant's medical findings must be "at least equal in severity and duration to the listed findings." 20 C.F.R. §§ 404.1526(a), 416.926(a).

Determinations of equivalence must be based on medical evidence only and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §§ 404.1526(b), 416.926(b).

B. Substantial Evidence Fails to Support the ALJ's Conclusion that Listing 12.05© is Inapplicable.

As noted above, the ALJ concluded that, "The diagnosis of mental retardation does not meet the requirements of Listing 12.05(c) because it cannot be established prior to age 22 and because claimant has a history of alcoholism and a learning disability, both of which could be the cause of the low IQ scores." Tr. at 19.

Grenham claims that it was improper for the ALJ to find his IQ scores invalid on the grounds that, "claimant has a history of alcoholism . . . which could be the cause of the low IQ scores." Docket # 14 at 13; Tr. at 19. No evidence in the record suggests that Grenham was abusing drugs or alcohol during the period of the IQ test. Dr. Schumer opined that the test results were "valid" in light of his observations of Grenham's effort and attitude in the course of taking the test. Tr. at 337. He also noted that Grenham had been sober (by self-report) for a substantial period of time. Tr. at 336. The ALJ noted similar evidence of Grenham's sobriety. Tr. at 19-20 (citing records stating Grenham remained sober from December 2005 through August 2007). In any event, the ALJ did not reject the IQ test on the grounds of drug use during the time frame of

⁵ The Court notes that evidence in the record suggests that Grenham relapsed with the use of opiates in January 2006, Tr. at 231 & 277, however, that use appears somewhat remote in time from the IQ test on November 6, 2006. Tr. at 335.

the test.6

Substantial evidence fails to support the conclusion that Grenham's prior substance abuse diminished his intellectual functioning as measured by the IQ test. No medical source stated that Grenham's IQ, or his cognitive functions in general, had been diminished by his substance abuse and the ALJ cited none. In fact, the only medical source to comment to any extent on this point was the clinician who administered the IQ test, Dr. Schumer, who stated in his report that Grenham's, "problems [functioning at work] would be evident independent of [his] history of polysubstance abuse." Tr. 338. The ALJ may not render a medical opinion, especially in the face of Dr. Schumer's statement and without other medical evidence, that Grenham's substance abuse history between the age of 22 and the date of the test in November, 2006 when he was fifty years old diminished his mental functioning as measured by the IQ test. See Rosado v. Secretary of Health and Human Services, 807 F.2d 292, 293-94 (1st Cir.1986) (An ALJ may not substitute his own judgment for an uncontroverted medical opinion); Rose v. Shalala, 34 F.3d 13, 18 (1st Cir.1994); Mathious v. Barnhart, 490 F.Supp.2d 833, 847 n. 14 (E.D. Mich.2007) ("The ALJ is not a medical doctor . . . and is therefore not qualified to determine whether someone's functional limitations and IQ scores are the product of alcohol or drug usage without some competent evidence or more thorough explanation.").

⁶ Such a finding would, of course, require, at the least, evidence from which an inference of concurrent drug use can be drawn. *See* Sturtevant v. Barnhart, 2005 WL 1353727, at 4 (D. Me.2005) ("[the] determination [that alcohol abuse invalidated the IQ score] is not supported by substantial evidence . . . Dr. Millis found the plaintiff's IQ to be in the mentally retarded range as of July 2003-a time frame when the administrative law judge determined that alcohol abuse was not a material issue"); Wilkinson v. Astrue, 2008 WL 1925133, at 4 (D. R.I.. 2008) (drug use material to validity of IQ scores where claimant with history of drug abuse tested positive for cocaine and opiates six weeks after IQ test).

Substantial evidence also fails to support the ALJ's conclusion that Grenham's, "learning disability . . . could be the cause of the low IQ scores." <u>Tr</u>. at 19. No medical source in the record opined that Grenham's learning disability rendered his IQ results an inaccurate measure of his intellectual functioning, nor was such evidence cited. In fact, Dr. Schumer opined otherwise. He noted that Grenham reported "learning difficulties" in school, <u>Tr</u>. at 336, and, nonetheless, posited that the IQ test "results are considered valid measures of his current intellectual and social-emotional functioning." <u>Tr</u>. at 337. Dr. Schumer did not indicate that Grenham's 'learning difficulties' would in any way result in an invalid measure of his IQ. Further, neither the regulations addressing the validity of intelligence testing nor those defining disability due to mental retardation make any mention of learning disabilities. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listings 12.00(D)(6), 12.05.

As an additional ground for finding that Grenham did not meeting Listing 12.05(c), the ALJ noted that, "Dr. Schumer's diagnosis of mental retardation is in apparent conflict with Dr. Daniels statement that the claimant had only mild limitations on the ability to understand, carry out and remember instructions." Tr. at 19. The conflict cited by the ALJ is more apparent than actual in this case. Mild mental retardation, i.e. an IQ of 69, encompasses the ability to, "be able to understand simple oral instructions, and to be able to carry out those instructions under somewhat closer supervision." Flagg v. Barnhart, 2004 WL 2677208, at 5 (D.Me.2004). A person with mild mental retardation may be able to maintain a household, care for children, and obtain a GED, Ouellette v. Apfel, 2000 WL 1771122 at 2-3 (D.Me.2000), or may have been enrolled in regular, as opposed to special education, classes, and may be able to read and write without difficulty, Mace, 2008 WL 4876857, at 3. As the First Circuit has noted, the Listings

reflect this reality, as they require a claimant to demonstrate another impairment apart from mild mental retardation before they can be found disabled. Nieves, 775 F.2d at 14. Further, the First Circuit has also stated that, "courts do not engage in further inquiry as to the first (I.Q.) requirement of Listing 12.05(c) once they find that the claimant's I.Q. was below 70." Id. In short, there is simply no substantial evidence to support the ALJ's conclusion that Grenham's 'mild limitations' are inconsistent with a diagnosis of mild mental retardation.

The ALJ also found that, "The diagnosis of mental retardation . . . cannot be established prior to age 22." The record, however, does contain evidence that may, "demonstrate[] or support[] onset of the [mental retardation] impairment before age 22." There is evidence in the record, albeit mainly in the form of Grenham's own testimony, that he was enrolled in special education classes, that he never completed high school, that he was, "pulled through grades", was ultimately unable to obtain his GED and still has difficulty with reading, writing, and mathematics. Tr. at 85, 145, 470, 482. These facts may support a finding that his mental retardation was manifest before age 22. Lombard v. Barnhart, 2003 WL 22466178, at 2-3 (D. Me. 2003) (claimant's status as a special education student, and his inability to read and write constituted sufficient evidence of onset prior to age 22, in spite of evidence that the claimant had received A's, B's and C's in school, and had held a job for over 20 years beginning at age 21);

⁷ Indeed medical evidence apart from the IQ score actually supported Grenham's claims as to his current functioning. Dr. Daniels reported that Grenham had "difficulty filling out paperwork [as he] doesn't understand what a lot of the words mean." Dr. Twarog reported that, "claimant was unable to spell the word 'World' backwards . . . was unable to count serially backwards by 7s from 100 . . . was unable to interpret the proverbs." Dr. Twarog diagnosed Grenham with a "learning disorder NOS," but did not diagnose, nor mention, mental retardation. <u>Tr.</u> at 238. However, Dr Twarog did not perform an IQ or other diagnostic test, and formed his opinion in March of 2006, prior to the administration of the IQ test by Dr. Schumer in November 2006. <u>Tr.</u> at 234, 335.

<u>Mace v. Astrue</u>, 2008 WL 4876857 (D. Me.2008) (graduation from high school at age 20, low grades, and failure to complete Army training consistent with finding of onset prior to age 22).

Thus, the Commissioner's citation to Morales v. Commissioner of Social Security, 2 Fed. Appx. 34, 37 (1st Cir.2001), is inapposite. In that case, "there [was] simply *no evidence* in the record that claimant had *any* deficits in adaptive behavior initially manifested . . . before age 22 . . . [C]laimant stated that she had obtained fair grades through the sixth grade, and had left school due to a skin condition." <u>Id</u> (emphasis added); *See also*, <u>Harthorne v. Astrue</u>, 2008 WL 4937806 (D. Me.2008) ("The satisfaction of the numerical IQ standard satisfies the Listing's reference to 'deficits in adaptive behavior'. . . thus evidence such as school records or other activities of the Plaintiff need not be considered further.").

Moreover, in adopting the current wording of Listing 12.05, the commissioner made clear that,

[W]e do not necessarily require evidence from the developmental period to establish that the impairment began before the end of the developmental period. The final rules permit us to use judgment, based on current evidence, to infer when the impairment began.

We did not intend the second paragraph of proposed listing 12.05 to require intelligence testing (or other contemporary evidence) prior to age 18 [now 22], but we believe that the proposed listing could be misinterpreted, even though it was the same as in the prior rules. The proposed listing, as in the prior rules, stated that the significantly subaverage general intellectual functioning with deficits in adaptive behavior must have been initially "manifested" during the developmental period. We have always interpreted this word to include the common clinical practice of inferring a diagnosis of mental retardation when the longitudinal history and evidence of current functioning demonstrate that the impairment existed before the end of the developmental period. Nevertheless, we also can see that the rule was ambiguous. Therefore, we expanded the phrase setting out the age limit to read: "i.e., the evidence demonstrates or supports onset of the impairment before age 22."

65 Fed. Reg. 50746, 50753, 50772 (Aug. 21 2000). Thus, though a claimant bears the burden of

demonstrating that mental retardation was manifest before age 22, this burden can be met without introducing evidence of early intelligence testing, or indeed without *any* contemporaneous evidence at all. That situation, however, is not presented in this case.

Additionally, and though none of the parties here have briefed the issue, the Court notes that other courts have often applied a presumption, "for purposes of meeting the longitudinal [onset prior to age 22] requirement of Listing 12.05(c), that a person's IQ remains fairly constant throughout life absent evidence indicating that the person suddenly became mentally retarded."8 Sturtevant, 2005 WL 1353727 at 4 (D. Me.2005) (rec. dec., aff'd June 27, 2005) (Woodcock, J.); See also Maresh v. Barnhart, 438 F.3d 897, 900 (8th Cir. 2005); Hodges v. Barnhart, 276 F. 3d 1265, 1268 (11th Cir.2001), aff'd on subsequent appeal, 99 Fed. Appx. 875 (11th Cir.2004) ("we find that a claimant need not present evidence that she manifested deficits in adaptive functioning prior to the age of twenty-two, when she presented evidence of low IQ test results after the age of twenty-two"); Guzman v. Bowen, 801 F.2d 273, 275 (7th Cir.1986); Branham v. Heckler, 775 F.2d 1271, 1274 (4th Cir.1985); Mace, 2008 WL 4876857 at 3 (D.Me.2008) (adopting rebuttable presumption that IQ remains fairly constant throughout life.); Teves v. McMahon, 472 F.Supp.2d. 82, 87 (D. Mass. 2007) ("Mental retardation is, absent major trauma to the head . . . a congenital condition which has no 'onset' date") (Stearns, J.); Rivera v. Apfel, 2000 WL 1568596 (W.D.N.Y.2000).

⁸This remains an open question in the First Circuit.

III. Conclusion

For the foregoing reasons, it is ORDERED that the Commissioner's decision be VACATED, and the case be REMANDED for further proceedings. Thus, the Plaintiff's Motion (Docket #13) is ALLOWED IN PART AND DENIED IN PART. The Defendant's Motion (Docket #16) is DENIED.

SO ORDERED.

/s / Leo T. Sorokin

UNITED STATES MAGISTRATE JUDGE